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No. 80-1349

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF WASHINGTON,

PETITIONER,

v.

NEIL MARTIN CHRISMAN,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. When an officer is standing immediately outside the premises in the doorway of the premises and his presence is known to the occupants, one of the occupants being an arrestee who has been allowed to enter the premises; and the officer makes observations of contraband in open view and such observations are apparent to the occupants of the premises; do "exigent circumstances" exist which would permit the officer to enter the premises without a search warrant under an "exigency exception" to the Fourth Amendment warrant requirement?

2. When an individual is validly under arrest and asks to be given access to an area, may the arresting officer in a reasonably contemporaneous manner accompany the individual into such area without first obtaining a search warrant authorizing entry into such area?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1-2
CONSTITUTIONAL PROVISION INVOLVED IN REVIEW	2
STATEMENT OF THE CASE	2-14
SUMMARY OF ARGUMENT	15-19
ARGUMENT	
I. ARGUMENT ON FIRST QUESTION PRESENTED FOR REVIEW	19-52
II. ARGUMENT ON SECOND QUESTION PRESENTED FOR REVIEW	53-70
CONCLUSION	70-72

TABLE OF AUTHORITIES

CASES

Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973)	39,40,51
Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925)	33,34,35

Chambers v. Maroney, 399 U.S. 42, 48-49, 26 L.Ed.2d 419, 426-427, 90 S.Ct. 1975 (1970) 32,33,35

Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969) 66

Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980). 35,36,37

Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971) 23,24,37 54,69

Gustafson v. Florida, 414 U.S. 260, 38 L.Ed.2d 456, 94 S.Ct. 488 (1973) 66

Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069, 88 S. Ct. 992 (1968) 23

Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948). 28,29 30,44

Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967) 24,25

Lewis v. United States, 385 U.S. 206, 210, 17 L ed 2d 312, 315, 87 S Ct 424 (1966) 25

McDonald v. United States, 335 U.S. 451, 456, 93 L.Ed. 153, 69 S.Ct. 191 (1948) 44

Michigan v. Summers, __ U.S. __, __ L.Ed.2d __, __ S.Ct. __, 49 U.S.L.W. 4776, Docket No. 79-1794 (Decided June 22, 1981) . 51,52

Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978) 41,42,45

Moffet v. State, 291 A. 382, 281 So. 2d 630 (1973), cert. denied 414 U.S. 1161, 39 L.Ed.2d 114, 94 S. Ct. 924 (1974) 58,61

Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) 47,68

Pennsylvania v. Mimms, 434 U.S. 106, 109-110, 54 L.Ed.2d 331, 336-337, 98 S.Ct. 330 (1977) 64,65

People v. Green, 14 Ill.App.3d 972, 304 N.E.2d 32 (1973), cert. denied 417 U.S. 972, 41 L.Ed.2d 1143, 94 S.Ct. 3179 (1974) 58,62

People v. Mann, 61 Misc.2d 107, 113, 305 N.Y.S.2d 226 (1969) 58

People v. Stevens, 38 Cal.App.3d 66, 113 Cal.Rptr. 49 (1974) 58

State v. Brown, 132 N.J.Super. 180, 333 A.2d 264 (1975). 57,60

State v. Chrisman, 24 Wn.App. 385, 600 P.2d 1316 (1979) 21,31,54 62,63

State v. Patterson, 192 Neb. 308, 220 N.W.2d 235, 240 (1974) 37

Terry v. Ohio, 392 U.S.1, 25,26, 20 L.Ed.2d 889, 88 S.Ct. 1868, 44Ohio Ops. 2d 383 (1968) 42

United States v. Chadwick, 433 U.S. 1, 6-11, 53 L.Ed.2d 538, 97 S.Ct. 2476 (1977) 44

United States v. DeMarsh, 360 F.Supp 132, 137, n.4 (E.D.Wis., 1973) . . 57

United States v. DiStefano, 555 F.2d 1094, 1101 (2nd Cir. 1977) 58

United States v. Griffith, 537 F.2d 900, 905 (7th Cir. 1976) 59,60

United States v. Jeffers, 342 U.S. 48, 51-52, 96 L.Ed. 59, 72 S.Ct. 93, (1951) 26,27

United States v. Lee, 274 U.S. 559, 563, 71 L.Ed. 1202, 1204, 47 S.Ct. 746 (1927) 25

United States v. Mason, 523 F.2d 1122, 1126 (D.C. Cir., 1975) 57,60

United States v. Peltier, 422 U.S. 531, 542, 45 L.Ed.2d 374, 384, 95 S.Ct. 2312 (1975). 69,70

United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) 66,67,68

United States v. Wright, 577 F.2d 378, 381 (6th Cir. 1978) 57

Vale v. Louisiana, 399 U.S. 30, 35, 26 L.Ed.2d 409, 90 S.Ct. 1969 (1970) 27,28

Warden v. Hayden, 387 U.S. 294, 18 L.Ed. 2d 782, 87 S.Ct. 1642 (1967) . . . 50

CONSTITUTIONAL PROVISIONS

Page

The Fourth Amendment to the United States Constitution 2

MISCELLANEOUS

Search and Seizure, a Treatise on the Fourth Amendment by Wayne R. LaFave, West Publishing Company (1978) 60

OPINIONS BELOW

The opinion of the Washington State Supreme Court (Pet.App. B, pp. 33-43) is reported at 94 Wn.2d 711, 619 P.2d 971. The opinion of the Court of Appeals (Pet. App. A, pp. 20-32) is reported at 24 Wn.App. 385, 600 P.2d 1316. The opinion of the Whitman County, Washington Superior Court (J.A. pp. 45-52) is not reported.

JURISDICTION

The judgment of the Washington State Supreme Court (Pet.App. B, pp. 33-43) was entered en banc on November 26, 1980. A Motion for Reconsideration was filed on December 10, 1980. On December 31, 1980, the Washington State Supreme Court entered an Order Denying Motion for Reconsideration (Pet.App. C, p. 46). On January 8, 1981 the Washington State Supreme Court entered its Mandate (Pet.App. C, pp. 44-45). The

Petition for Writ of Certiorari was filed on February 10, 1981 and was granted on June 22, 1981. The jurisdiction of this court rests upon 28 U.S.C. 1257(3) and the provisions of Supreme Court Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISION INVOLVED IN REVIEW

The Constitutional provision involved in review is the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the evening of January 21, 1978, between approximately 8:50 and 8:55 P.M.

(R.P. 3, R.P. hereinafter refers to Verbatim Report of Proceedings at Suppression Hearing) Mr. Overdahl, carrying a half gallon of gin, walked out of Orton Hall at Washington State University with several student friends on their way to a party (R.P. 3). At that moment Officer Daugherty of the Washington State University Police Department arrived at the dorm to investigate an unrelated matter (R.P. 3). The officer noticed the bottle of gin and suspected that Mr. Overdahl, because of his youthful appearance, was under the legal age to possess alcohol, the age of twenty-one (R.P. 4,6; J.A. 7,8). The officer knew that a person under twenty-one years of age could not legally possess liquor in Washington and also knew that possessing liquor inside dormitories was in violation of Washington State University rules (J.A. 7,9,10). He stopped Mr. Overdahl, seized the alcohol, detained him and

requested identification (R.P. 5,57). Mr. Overdahl did not have any identification on his person (J.A. 8). Mr. Overdahl stated that he would have to go upstairs to his dormitory room to get the identification (J.A. 8). Officer Daugherty indicated to Mr. Overdahl that since Mr. Overdahl was under police detention, he would not allow him to leave without an officer accompanying him to his room (R.P. 5,6,35; J.A. 9); because he needed identification (J.A. 19, 21). Mr. Overdahl indicated "O.K." (J.A. 35). As they were waiting for the elevator, the officer asked Mr. Overdahl how old he was. Mr. Overdahl responded that he was nineteen (R.P. 6; J.A. 9.).

Upon arriving on the eleventh floor of the dormitory, Officer Daugherty followed Mr. Overdahl down the hallway to Mr. Overdahl's room, Room 1141 (R.P. 7,59). The door to Mr. Overdahl's room was slightly

ajar, open approximately three to four inches (J.A. 11,12) and Mr. Overdahl pushed it all the way open (J.A. 12), left it open, and entered the approximately 17' by 11' room (J.A. 1). The officer stood in the doorway, without entering the premises (J.A. 17), directly under the door frame, looking into the room. The officer's left shoulder was leaning against the door frame (he was out in a common public hallway) (R.P. 7,8,19,21, 43,44; J.A. 47). The officer noticed that the room was occupied by another student, Neil Chrisman, the respondent in this action, hereinafter referred to as defendant (R.P. 9). The defendant had a box in his hands, admitted at the Suppression Hearing as Ex. 5 (R.P. 10). The defendant did not immediately see Officer Daugherty, according to Officer Daugherty (R.P. 10). After approximately 8 to 10 seconds he saw Officer Daugherty (R.P. 39-40). When the defendant did see

Officer Daugherty, he appeared to Officer Daugherty to become rather nervous (R.P. 12; J.A. 13), first looking at Officer Daugherty, then looking away, then glancing quickly back (R.P. 12). The defendant then approached the medicine cabinet in the room, put his hand toward it, withdrew his hand and walked over (R.P. 12) to a desk in the corner of the room. The defendant placed the box he was carrying on top of some metallic boxes on the desk (R.P. 13) and moved toward the center of the room (R.P. 12) and watched Officer Daugherty (R.P. 13).

After waiting at the doorway and watching the occupants for a short time, approximately 30 to 45 seconds (R.P. 53; J.A. 28), Officer Daugherty observed both seeds in a shallow black pan and a small ornamental seashell pipe lying on the desk (R.P. 13), [the end of the pipe was blackened (R.P. 52, 53; J.A. 27)] approximately 8 to 10 feet

from where Officer Daugherty was standing (R.P. 14). The pipe was of a type known by the officer to be used for smoking marijuana (R.P. 17; J.A. 47). The light in the room was such that the officer had no trouble seeing the seeds from that distance (R.P. 10, 48; J.A. 38). Based upon his training and experience (R.P. 45) the officer immediately recognized the items as contraband (J.A. 23,24,27,28) (prior to entering the premises). The officer was familiar with the appearance of marijuana seeds (R.P. 45, 46; J.A. 14,15,23,24). He thereafter entered the room and proceeded to examine the seeds and pipe more closely (R.P. 13,17,18). After completing his inspection, he again concluded that the items were contraband and gave the two students their Miranda rights (R.P. 19,20). [later at the suppression hearing the trial judge commented that the seeds in question did not appear

to look like seeds of any common commodity, J.A. 32]. There were no plants or animals in the room that would explain the presence of the seeds (R.P. 18; J.A. 15,16). Both Mr. Overdahl and the defendant indicated that they understood their rights and were willing to waive them (R.P. 23,24). The officer asked them if there were any other drugs in the room and the defendant handed him the box that Officer Daugherty had observed the defendant place on the desk. The box contained three bags of marijuana (R.P. 60; J.A. 47).

Officer Daugherty radioed for assistance and Officer Kenny arrived shortly thereafter, approximately 3 to 5 minutes (R.P. 26). Officer Kenny informed the defendant and Mr. Overdahl that a search of their room was necessary (R.P. 27). He explained that they had an absolute right to demand that the police obtain a search

warrant, which would take about two hours (R.P. 28; J.A. 18), or they could consent to a search of their room. He further explained that their consent must be voluntary and that they had a right to refuse consent (R.P. 62). After conferring in whispers for approximately 4 to 10 minutes (R.P. 64), Mr. Overdahl and the defendant agreed to the search (R.P. 64,65). Prior to signing a written consent to search form, the defendant and Mr. Overdahl were again advised of their Miranda rights (R.P. 69; J.A. 43). A search of the room yielded more marijuana and also LSD (J.A. 48).

The defendant and Mr. Overdahl were charged by information with one count of felony possession of marijuana and one count of felony possession of LSD (J.A. 2). Prior to the trial, a suppression hearing was held and the defendants moved to suppress all evidence on the basis that all the evidence was tainted as a result of an

illegal search and seizure. The trial judge denied the motion (J.A. 44-45). The defendant and Mr. Overdahl were tried without a jury and convicted as charged (J.A. 3). This conviction was appealed to the Washington State Court of Appeals, Division III (J.A. 4). In a published opinion the Court of Appeals upheld the defendants' convictions (J.A. 4; Pet.App. A, pp. 20-32). The Court of Appeals indicated that the officer's observation of the contraband in the room and the defendant's reaction to the officer's presence were such that if the officer had left the premises immediately after observing the seeds and pipe in an attempt to secure a search warrant, the contraband would likely have been removed during the interim and additionally, because drugs are readily disposable, there were sufficient exigent circumstances existing to justify the warrantless search of the

room; the contraband permissibly having come into view as the product of a pre-intrusion "open view" observation from the doorway of the room (Pet.App. A, pp. 29-30). The defendant and Mr. Overdahl then filed with the Court of Appeals a Motion for Reconsideration which was denied on the 4th day of December, 1979 (J.A. 4-5).

Both the defendant and Mr. Overdahl then appealed to the Washington State Supreme Court alleging that the seizure was the product of an illegal warrantless search (J.A. 5).

On March 31, 1980, the Superior Court dismissed the felony probation and expunged the conviction of Mr. Overdahl to facilitate his entry into an advanced Army ROTC program, therefore this case only concerns the defendant. The dismissal was upon joint motion of petitioner herein and Mr. Overdahl through his legal counsel.

On November 26, 1980, the Washington State Supreme Court ruled in the defendant's favor (Pet.App. B, pp. 33-40) and found (see comments in dissenting opinion Pet.App. B, pp. 40-41) that the officer could not enter the room without a warrant even to accompany an arrestee who had requested to be allowed and had been allowed to voluntarily return to the room in question (Pet. App. B, pp. 42-44). Additionally the Washington State Supreme Court found that at the time of the officer's entry into the room, that there were no exigent circumstances that justified a warrantless entry, rejecting the application of "plain view" and the applicability of any exception to the warrant requirement based on exigent circumstances (Pet.App. B, p. 39).

Although the Washington State Supreme Court Opinion indicates exigencies were not argued (Pet.App.B, p.39), this is an apparent reference to exigencies other

than the observations made by the officer outside the room. The Washington State Supreme Court declined to decide where the officer was originally located inside the room at the time of his initial observations of the contraband, labeling such as "niceties". (Pet.App. B, p. 38). There is no question that exigencies were argued by the petitioner at every stage of the proceedings in this matter (R.P. 92),; see trial court's oral opinion (J.A. 32-33); the trial court's findings of fact and conclusions of law (J.A. 45); the trial court's memorandum opinion which discusses circumstances to justify entry into the room (J.A. 50); the State's brief to the Court of Appeals (J.A. 53-57); the Court of Appeals Opinion accepting the State's argument concerning exigent circumstances (Pet. App. A, pp. 28-29); and State's Answer to Defendant's Motion for Discretionary Review filed with

the Washington State Supreme Court (J.A. 58).

On December 10, 1980, the State filed with the Washington State Supreme Court a Motion for Reconsideration of its judgment (J.A. 5). On December 31, 1980 the Washington State Supreme Court entered an Order Denying Motion for Reconsideration (Pet.App. C, p. 46). On January 8, 1981 the Washington State Supreme Court entered its Mandate in the case (Pet.App. C, pp. 44-45). On February 10, 1981 the Petition for Writ of Certiorari was filed. On June 22, 1981 the Petition for Writ of Certiorari was granted.

SUMMARY OF ARGUMENT

I.

The Fourth Amendment to the United States Constitution protects people, that is, a person's reasonable expectation of privacy in a place, not the place. By Mr. Overdahl leaving the door to the premises wide open which afforded the officer an all encompassing "open view" of the premises and the contraband in question, Mr. Overdahl's action created an appreciable lessening of the reasonable expectation of privacy in the premises. The close proximity of the officer to the contraband from outside the premises and the defendant's knowledge of the officer's presence and his nervous reaction to the officer's observations of the contraband created exigent circumstances. That is, it became readily apparent to the officer that if the officer left and procured a search warrant prior to the seizure,

by the time he returned the contraband would most likely have been removed or destroyed. Since the officer did not have any reasonable non-intrusive method of preventing removal or destruction of the contraband during the period he would have had to be gone to obtain a warrant, it can be said it was not practical for him to obtain a warrant. His entry onto the premises and subsequent seizure of the contraband was therefore constitutionally reasonable and should be approved by this court under the "exigency exception" to the Fourth Amendment warrant requirement.

II.

A person properly under arrest has a diminished expectation of privacy under the Fourth Amendment to the United States Constitution. An officer in an arrest situation must be given sufficient latitude to not only control the arrestee but to protect himself and prevent potential evidence

from being destroyed. Accordingly, this court has allowed an arresting officer to not only search the person of an arrestee but to search the immediate area within control of the arrestee. A custodial arrest of a suspect upon probable cause is a reasonable intrusion under the Fourth Amendment and that intrusion being lawful, a search incident to the arrest requires no additional justification. In order to continue to have legitimate control over the arrested person, the officer must be authorized to accompany an arrestee to other areas and particularly to contemporaneously accompany an arrestee onto premises when the arrestee requests to be allowed to return to the premises for his own convenience and is permitted to do so. An arrested person should be afforded reasonable mobility.

The right of a law enforcement officer incident to an arrest of the person

to accompany the arrestee onto premises the arrestee has voluntarily returned to is not constitutionally dependent on the officer articulating some specific danger to himself or potential evidence or the probabilities in the particular arrest situation that weapons are present. To require such a showing would unduly interfere with a law enforcement officer's ability to do an adequate and effective job and interfere with his abililty to protect himself and potential evidence. The need to promote a police officer's safety is not less compelling simply because a person has been arrested for a minor criminal offense.

Therefore Officer Daugherty's contemporaneous entry upon the premises to accompany the arrestee was a constitutionally permissible adjunct to the arrest status of Mr. Overdahl. When the officer contemporaneously entered the premises and observed the contraband in "plain view",

he had authority to seize the same.

Additionally, the exclusionary rule should not be applied to the case at bar since the evidence seized was a product of the officer's "good faith" search and/or seizure of evidence.

ARGUMENT

I.

PURSUANT TO THE EXIGENCY EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT THE OFFICER HAD AUTHORITY TO ENTER THE PREMISES WITHOUT A WARRANT AND SEIZE THE ITEMS OF CONTRABAND OBSERVED BY HIM IN "OPEN VIEW" DUE TO THE EXIGENT CIRCUMSTANCES THAT EXISTED WHICH DID NOT AFFORD THE OFFICER A PRACTICAL OPPORTUNITY TO SECURE A SEARCH WARRANT.

A review of the appropriate portion of the Statement of the Case, page 13, reveals that the Washington State Supreme Court never decided the issue of whether or

not Officer Daugherty was or was not in the room at the time he originally saw the contraband and formed his probable cause to seize the contraband.

The record of the trial court and the opinion of the Court of Appeals indicate that Officer Daugherty was in fact not in the room (not on the premises) at the time he made his initial "open view" observations of the contraband. Instead, he was outside the room and located in the doorway (R.P. 7,8,21). The trial court in its Memorandum Opinion (J.A. 47) stated:

> Overdahl opened the door, which was slightly ajar, left it open and went inside for his identification. The officer stood in the doorway, and watched. Chrisman was in the room. The officer observed a pipe of a type known by him to be used for the smoking of marijuana and seeds which appeared to him to be marijuana seeds. He was familiar with marijuana and marijuana seeds. When Chrisman became aware of the officer he appeared to become nervous and upset. The officer then entered the room and examined the pipe and seeds closely. (emphasis mine)

The Court of Appeals observed in its opinion:

> Officer Daugherty watched the two occupants for a few moments before he saw a tray on a desk 8 to 10 feet from where he was standing; the tray contained seeds. A small pipe lay nearby which his experience led him to believe was used for smoking marijuana. At this point, Officer Daugherty entered the room, walked over and examined the seeds and pipe to verify that what he had observed was marijuana. (emphasis mine)

State v. Chrisman, 24 Wn.App. 385, 386, 600 P.2d 1316 October, 1979. (Pet.App. A, p. 22).

As the Court of Appeals additionally observed in State v. Chrisman at 389 (Pet. App. A, p. 27):

> It is undisputed that Mr. Overdahl pushed the door open and entered the room. In order to keep Overdahl within his view, the officer stood in the doorway looking into the room. There is no suggestion that Overdahl attempted to close the door once he had entered. Prior to entering the room, the officer saw from his vantage point in the doorway what he believed was contraband. Only at that time, did he cross the threshold and seize the pipe and marijuana seeds.

It is the position of the petitioner, hereinafter referred to as the State, that at the time Officer Daugherty made the observations he clearly was not in the room. Contrary to the statement by respondent on page two of his Brief in Opposition to Petition for Writ of Certiorari, the State does not maintain that the officer was in the room at the time of his initial observations. The State in fact does not posit that the officer was both in and outside the room, but simply is arguing that although the officer did not initially join Mr. Overdahl in entering the room, his subsequent entry was reasonably contemporaneous with Mr. Overdahl's entry. It is noted that Mr. Overdahl entered the room and left the door to the dorm room wide open; affording the officer a complete view of the room and totally exposing any expectation of privacy that the defendant

or Mr. Overdahl had in the room to being viewed by the officer who was standing in a public hallway. A discussion of the officer's entry into the room as an adjunct to the arrest status follows herein in the discussion beginning on page 53 as to the second question presented for review.

It is the State's position that as to the first issue presented for review, the Washington State Supreme Court improperly applied a post-intrusion exception to the warrant rule, that is, "the plain view doctrine"; see Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971); to what in actuality was a situation that called for the application of both the pre-intrusion doctrine of "open view", Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069, 88 S.Ct. 992, and the "exigency exception" to the

Fourth Amendment warrant requirement.

Although the general rule is that a search without a warrant is per se unreasonable under the Fourth Amendment, Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), this court has delineated carefully drawn exceptions when the exigencies of the situation make the application of an exception warranted; Coolidge v. New Hampshire, supra, 403 U.S. at 455. When one looks at the totality of the circumstances facing the officer in the case at bar, it appears readily apparent that an immediate warrantless seizure of the items in "open view" was justified pursuant to the doctrine of exigent circumstances.

Such is particularly true in light of the reduction of expectation of privacy caused by Mr. Overdahl's rather casual exposure of the premises to Officer Daugherty.

It seems superficially technical to argue that the Fourth Amendment would protect against the seizure that took place by Officer Daugherty in the case at bar. The Fourth Amendment really protects people, not places, that is, a person's reasonable expectation of privacy in a place as opposed to protecting the place. In Katz the court stated:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 US 206, 210, 17 L ed 2d 312, 315, 87 S Ct 424; United States v. Lee, 274 US 559, 563, 71 L ed 1202 1204, 47 S Ct 746.

Katz v. United States, supra, 389 U.S. 351, 19 L.Ed.2d 582.

It should be remembered when considering the situation that gave rise to the exigent circumstances which faced the officer, that the officer did not go to the room to fulfill his own purposes, but to

allow Mr. Overdahl to effectuate a more timely release from custody by properly proving his identity. The officer was attempting to handle the situation in a "low-key" fashion (J.A. 28-29). The officer did not allow Mr. Overdahl to return to his room for any purpose other than to allow Mr. Overdahl to obtain identity. It was Mr. Overdahl's choice to expose the privacy of his and the defendant's room to view of the officer. The officer was not involved in any sham or pretext to search.

It is clear that prior to entering the room the officer had probable cause to believe, based on his training and experience, that what he was viewing, in "open view", was a controlled substance.

This court has recognized that there are circumstances under which a police officer may enter a private residence without a warrant and search. In U.S. v.

Jeffers, 342 U.S. 48, 51-52, 72 S.Ct. 93, 96 L.Ed. 59 (1951), this court acknowledged that exigent circumstances may allow the entry into a private residence to seize evidence without a warrant. An exigent circumstance cited by the court in Jeffers would be the need to prevent the destruction of evidence. This principle is likewise acknowledged, although not applied, in Vale v. Louisiana, 399 U.S. 30, 35, 26 L.Ed.2d 409, 90 S.Ct. 1969 (1970). Although this court in Vale v. Louisiana, supra, did find in the particular factual situation that there were not exigent circumstances justifying warrantless arrest, the court did observe, in commenting on the officers' actions:

> There is thus no reason, so far as anything before us appears, to suppose that it was impracticable for them to obtain a search warrant as well.

399 U.S. 35, 26 L.Ed.2d 414.

In Vale v. Louisiana, supra, the officers arrested an individual outside his residence and attempted to use that as justification for a search of the residence. It is clear that the officer in the case at bar did not intend to use the arrest of Mr. Overdahl as a basis to search Mr. Overdahl's premises. He only entered the premises and seized the contraband in question when he was confronted with the exigencies of the moment.

In Johnson v. United States, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1948), this court, while generally upholding the requirement of the need for a warrant before permitting the search of a private premises, nevertheless acknowledged:

> There are exceptional circumstances in which on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for a search may be dispensed with.

333. U.S. at 14, 15, 92 L.Ed. 440-441.

It appears the reason this court did not excuse the acquisition of a warrant in Johnson v. United States, supra, was that no reason was shown for not first obtaining a search warrant except the inconvenience of the officers and slight delay that would have been occasioned by obtaining the same. In Johnson v. United States, supra, the officers in fact created their own exigency by unnecessarily acting on the "open smell" observations which gave them probable cause in lieu of presenting their probable cause to an impartial magistrate. The initial "open smell" observation did not need to come to the defendant's attention. In the case at bar, of course, Officer Daugherty did not consciously put himself in that position; his conduct was reasonable in accompanying the individual he had under arrest up to the doorway of the dorm room. It was Mr. Overdahl's con-

duct in leaving the door open and allowing a full "open view" of the premises in conjunction with the obvious realization thereafter by all parties present that the officer had seen contraband that created the exigency. At that juncture the officer had really no choice but to enter the premises and seize the items of contraband. It cannot be realistically suggested that he could simply have gone to obtain a warrant with any reasonable expectation that the contraband would still be available upon his return. Clearly, had Officer Daugherty left, the contraband he had observed would be threatened with removal or destruction. Common sense tells us that much. Therefore, the application and reasoning expressed by this court in Johnson v. United States, supra, would justify the dispensing with a magistrate's warrant.

The Court of Appeals in rendering its decision in the case at bar observed:

> . . . Officer Daugherty's observation of the pipe and seeds was a preintrusion 'open view' observation from the doorway of Overdahl's room which, like the driveway in State v. Daugherty, supra, was a semi-private area. Unlike the facts in Daugherty, exigent circumstances existed here. Because the drugs could have been readily disposed of while the police officer was trying to obtain a search warrant, sufficient exigent circumstances existed to justify the seizure.

24 Wn.App. 390 (Pet.App. A, p. 29).

In order to determine that exigent circumstances did not exist would require one to ignore the realities of human nature and the reasonable probabilities of everyday life. Officer Daugherty's observation of the contraband in the room and the defendant's reaction to Officer Daugherty's presence were such that it is reasonably apparent that if Officer Daugherty had left the premises immediately after observing the seeds and pipe and attempted to secure search warrants, the contraband would likely have been des-

troyed during the interim; see the trial court's oral observation (J.A. 33).

This court has held that where an officer has probable cause a warrantless search and/or seizure is authorized if it is not practical to secure a warrant because the nature of the circumstances would jeopardize the continuing availability of the evidence. When the attending circumstances make the officer's ability to control the evidence fleeting and impracticable, it appears this court has held that the circumstances are tantamount to being exigent; see Chambers v. Maroney, 399 U.S. 42, 48-49, 26 L.Ed.2d 419, 426-427, 90 S.Ct. 1975 (1970). Although Chambers v. Maroney, supra, involved a warrantless search of an automobile, it appears in effect that this court has said that in the right circumstances, the mobility of the automobile is what verifies the impracticability of obtaining a warrant. Potential mobility is

the aspect of the situation which creates the exigent circumstance which has led this and other courts to sanction warrantless searches where such would not normally be sanctioned as to a residence. Therefore, although cases such as Chambers v. Maroney, supra, and Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925), involve warrantless searches of automobiles, they do appear to underscore the premise that where it is impracticable to obtain a warrant and the officer does have probable cause upon which to base the search and/or seizure, that such should be sanctioned pursuant "exigent circumstance".

In balancing the interests of the public to be protected against the commission of a crime with the interests and rights of an individual citizen to be free from unreasonable searches and seizures, it is hard to imagine that at the time the Fourth Amend-

ment was adopted that such conduct as occurred in this case would have been considered an unreasonable seizure. As this court observed in Carroll v. United States, supra:

> The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

267 U.S. 147, 69 L.Ed. 543.

Additionally, in Carroll v. United States, supra, the court observed:

> The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interest as well as the interest and rights of individual citizens.

267 U.S. 149, 69 L.Ed. 549.

This court additionally noted:

> In cases where the securing of a warrant is reasonably practicable, it must be used, . . . (emphasis mine)

267 U.S. 156, 69 L.Ed. 552.

It is in this context that the holding in Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980), is particularly germane and significant. Although in Colorado v. Bannister, supra, this court again dealt with the warrantless search of an automobile, in many ways the case is factually similar to the case at bar. The officer in Colorado v. Bannister, supra, was making a routine traffic stop and from the doorway of the vehicle observed property appearing to be contraband from a recent reported theft of auto parts. The officer arrested two occupants of the vehicle outside the vehicle and entered the vehicle to seize the items without a warrant; that is, the items that had been seen in "open view". The court observed that under the judicial philosophy expressed in Carroll v. U.S., supra, and Chambers v. Maroney, supra, the circumstances provided not only

probable cause to arrest but probable cause to seize the incriminating items without first obtaining a warrant. The court, in footnote 2, 101 S.Ct. 43, noted:

> As the reason for the stop was wholly unconnected with the reason for the subsequent seizure, it would be especially unreasonable to require a detour to a magistrate before the unanticipated evidence could be lawfully seized.

It is important to again note in the case at bar that Officer Daugherty's purpose for being present near the doorway of the defendant's and Mr. Overdahl's room was totally unconnected with the ultimate seizure. It is clear that the officer did not anticipate that he would be seeing the contraband. There is obviously no indication that the officer's actions in accompanying Mr. Overdahl to the room were any type of pretext; in fact it could not have been because the officer had no reason to believe there were drugs in the room, he

was simply accompanying Mr. Overdahl back to his room after Mr. Overdahl suggested that he retrieve his I.D. from his room. As to pretext, see footnote 4, Colorado v. Bannister, supra, 101 S.Ct. 44.

See also State v. Patterson, 192 Neb. 308, 220 N.W.2d 235, 240 (1974), wherein the Nebraska State Supreme Court ruled that where information in possession of the officer leads to the conclusion that a crime is being committed in the residence and the officer has evidence which indicates that there is a great likelihood that the evidence will be destroyed or removed before a warrant can be obtained, then exigent circumstances may be said to exist.

In Coolidge v. New Hampshire, 403 U.S. 443, 460-461, 29 L.Ed.2d 564, 579, 91 S.Ct. 2022 (1971), there were several important factors that caused the court to find that

no exigent circumstances existed. The defendant in question was separated from the automobile that was sought to be searched under exigent circumstances and had no possibility of access to it. There was no evidence that the items to be seized were contraband nor readily disposable. The defendant's wife and their baby were required to spend the night elsewhere. Two guards were placed on the premises to avoid anyone gaining entrance to the premises and tampering with potential evidence. Also, the officers had sufficient forewarning of the situation with attending probable cause that they could have, had they made the effort, practically obtained a warrant. The case is clearly distinguishable from the situation in the case at bar.

The practicality of obtaining a warrant should not be viewed in an artificial

light. In the case at bar it was neither realistic nor practical for the officer to have obtained a warrant. This court has indicated in Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), that reasonableness is not judged entirely on the fact that a "less intrusive" means of seizing evidence could have been used. This court has observed:

> While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable. Cf. Chambers v Maroney, supra.

413 U.S. 447, 37 L.Ed.2d 718.

This court in Cady v. Dombrowski, supra, acknowledged that a warrant is not necessary where evidence could easily be

moved or destroyed before a warrant could be secured.

A study of Cady v. Dombrowski, supra, makes it clear that there are no "hard and fast" rules as to when a recognized exception to the warrant requirement will apply. The question of when a warrant is required must be answered by examining the facts of each individual case that comes under the scrutiny of the court. The ultimate standard set forth in the Fourth Amendment is a standard of reasonableness. This court observed in Cady v. Dombrowski, supra, in making reference to the general rule allowing for a warrantless search:

> While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

413 U.S. 440, 37 L.Ed.2d 714.

The defendant in his Brief in Opposition to Petition for Writ of Certiorari at page 10 relied on Mincey v. Arizona, 437 U.S. 385, 57 L.Ed.2d 290, 98 S.Ct. 2408 (1978). Mincey v. Arizona, supra, is clearly distinguishable factually from the case at bar. In that case the state tried to justify an extensive and complete four day search of the entire apartment where a homicide had taken place without showing that such a search was justified either by exigent circumstances or some other specifically established and well delineated exception to the warrant requirement. There was no showing of exigencies or even a pretense that exigencies existed. This court noted:

> The Arizona Supreme Court did not hold that the search of the petitioner's apartment fell within any of the exceptions to the warrant requirement previously recognized by this court, but rather that the search of the homicide should be recognized as an additional exception.

437 U.S. 390, 57 L.Ed.2d 299.

It is clear that in Mincey v. Arizona, supra, this court simply decided that it was not going to create a "homicide scene" exception to the warrant requirement. It is interesting to note that in Mincey v. Arizona, supra, this court did recognize that officers may need to make a warrantless entry and search of a premise when there is some exigent circumstance. The officers in Mincey v. Arizona , supra, ran afoul of the constitution when they wanted to expand their initial search to a four day complete search of the apartment. The court noted that:

> But a warrantless search must be 'strictly circumscribed by the emergencies which justify initiation,' Terry v. Ohio, 392 U.S.1 at 25-26, 20 L.Ed.2d 889, 88 S.Ct. 1868, 44 Ohio Ops 2d 383, and it simply cannot be contended that this search was justifed by any emergency threatening life or limb.

437 U.S. 393, 57 L.Ed.2d 300.

It is clear in the case at bar that had Officer Daugherty subsequent to his entry on premises and seizure of the contraband in open view gone on to conduct a full search of the dorm room prior to obtaining a search warrant or obtaining consent from the occupants, that a situation proscribed by Mincey v. Arizona, supra, would then be present. This writer appreciates that an exigent circumstance does not exist simply because it would be easier for the officer to proceed without a warrant. It is submitted, however, that in the case at bar there were no realistic or practical alternatives to the officer entering the premises and seizing the contraband. In this regard, as observed in Mincey v. Arizona, supra:

> The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights

> that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. See United States v Chadwick, 433 US 1, 6-11, 53 L Ed 2d 538, 97 S Ct 2476. For this reason, warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. McDonald v United States, 335 US 451, 456, 93 L Ed 153, 69 S Ct 191; Johnson v United States, 333 US 10, 14-15, 92 L Ed 436, 68 S Ct 367.

437 U.S. 436-437, 57 L.Ed.2d 301.

Also, this court observed:

> Except for the fact that the offense under investigation was a homicide, there were no exigent circumstances in this case, as, indeed, the Arizona Supreme Court recognized. 115 Ariz, at 482, 566 P2d, at 283. There was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant. Indeed, the police guard at the apartment minimized that possibility. And there is no suggestion that a search warrant could not easily and conveniently have been obtained.

437 U.S. 394, 57 L.Ed.2d 301.

In Mincey v. Arizona, supra, at 437 U.S. 394, 57 L.Ed.2d 30, this court discussed the presence of exigent circumstances which would justify a warrantless search or seizure. The court in affect indicated that exigent circumstances would be deemed to exist if it was shown that evidence would be lost, destroyed or removed during the time required to obtain a search warrant. The defendant in his Brief in Opposition to Petition for Writ of Certiorari, argues that there were no exigent circumstances existing in the case at bar because a guard could have been posted on the dorm room and alleviated the existence of exigencies during the time that would have been required to obtain a search warrant. Of course Mincey is distinguishable from the case at bar because in that case the officers did not already have an "open view" of the evidence they wished to seize. It seems a strained

analysis to suggest that that which has already been voluntarily exposed to view of the officers cannot be seized without the procurement of a warrant when the occupants are aware of the officer's presence and remain on the premises.

The defendant's suggestion, in his Brief in Opposition to Petition for Writ of Certiorari, that the posting of a guard could effectively eliminate exigencies pending the time necessary for procurement of a warrant when placed under close and logical scrutiny, would create a "Catch 22" situation for the officer involved in the case at bar. In order to do a reasonable job as a law enforcement officer, Officer Daugherty had to do something reasonably calculated to secure the status of the contraband; that is, to keep it from being jeopardized during his absence if he were going to leave to obtain a warrant. How

would he have gone about effectively utilizing a guard to either remove the occupants of the premises, control the activities of the occupants of the premises, or to require the continuing invasion of their privacy by requiring the door to the dorm room to remain open pending the procurement of a warrant if exigencies did not exist for the guard to either enter the premises or otherwise take active control of the activities on the premises or of the people on the premises; see Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980). In order to preserve the situation and eliminate the existence of exigencies, the very privacy which the Fourth Amendment purports to protect would have to be totally violated in order for the officer to effectively control the situation. To constitutionally accomplish such would require in itself a showing of "exigent circumstances".

One wonders what privacy interest or expectation of privacy interest would really remain to be protected by the Fourth Amendment during the period during which by necessity the normal expectation of privacy of the occupants would be totally supplanted in order to create a reasonable time during which a magistrate could review the probable cause to issue a warrant. In this case the period required would have been approximately two hours (R.P. 38; J.A. 18). The officer in the case at bar already had the contraband in question in "open view", was in close proximity to the same and had been allowed by one of the occupants of the room to be both in close proximity and have it in view. To effectively control the situation at the minimal the officer would have to do something that would continue to expose the object of his seizure to close and continuing scrutiny. In such a setting, how can any-

thing more than a bare minimal legitimate expectation of privacy remain to be protected or actually be protected by requiring the acquisition of a warrant prior to any seizure. Although the enigma and dilemma created by the defendant's suggestion of posting a guard is a fascinating one for legal technicians to "toy with", it is a suggestion that has very little practical utility in everyday life and does really nothing to prevent unreasonable searches and seizures since effective and meaningful implementation of the suggestion by its very nature would destroy instead of preserve any privacy right.

It appears the distinction between allowing the officer to enter the premises and seize the contraband in "open view" or to seize the persons and remove them from the premises and then secure the premises while waiting the acquisition of the search warrant or to require their privacy to

continue to be exposed by requiring the dorm room door to remain open or to control their activities inside the premises, is of little constitutional significance. To say that implementation of any of these approaches would result in more or less of a constitutionally significant action than implementation of the other remaining options in light of the situation where the contraband is in open view and exposed to the officer's view, would be at best a highly technical application of the provisions of the Fourth Amendment. In Warden v. Hayden, 387 U.S. 294, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967), this court spent a significant portion of the opinion explaining that the exigent circumstances doctrine could apply to mere evidence as well as the apprehension of a fleeing suspect. Therefore it does not appear of any controlling significance that the police officer in the case at bar seized evidence

rather than seized a person.

It appears that the least intrusive means of ultimately seizing the contraband in question was for the officer to enter the premises and immediately seize the same as opposed to attempting to fashion some method that would have required an ongoing invasion of privacy to the occupants of the premises during the approximate two hour period it would have taken to obtain a warrant. However, this court should not adopt a philosophy that sanctions only the least intrusive method for effectuating a seizure. This court should permit any reasonable method of search and seizure; see discussion on Cady v. Dombrowski, supra, at pages 39-40 herein. This court has permitted seizures otherwise covered by the Fourth Amendment which constituted less of an intrusion where the circumstances rendered such reasonable; see Michigan v.

Summers, ___U.S.___, ___ L.Ed.2d ___, ___ S.Ct. ___, 49 U.S.L.W. 4776, Docket No. 79-1794 (Decided June 22, 1981).

It is clear then by a reasonable analysis and application of the two concepts of "exigent circumstances" and "reasonable expectation of privacy" that the officer's actions in this case were justified by the circumstances and did not amount to an unreasonable violation of a legitimate constitutional expectation of privacy. The seizure was not constitutionally "unreasonable". The officer, who had probable cause, simply did not have a practical opportunity to obtain a warrant prior to the seizure of the contraband in question.

II.

AN OFFICER MAY MAKE A CONTEMPORANEOUS ENTRY INTO PREMISES TO ACCOMPANY AN INDIVIDUAL WHO IS UNDER ARREST STATUS WHEN THAT INDIVIDUAL REQUESTS AND IS GIVEN PERMISSION TO RETURN TO SAID PREMISES SINCE SUCH AN ENTRY BY THE OFFICER IS NECESSARY IN AN ARREST SITUATION AND THEREFORE NOT AN UNREASONABLE SEARCH OR SEIZURE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In addition to the officer having authority to enter the premises pursuant to "exigent circumstances", it is the State's position that the officer had authority to contemporaneously enter the premises with the arrestee and thereafter then being on the premises to make the seizure of the contraband pursuant to the "plain view doctrine".

It is clear that Officer Daugherty, at the time he allowed Mr. Overdahl to return to his room, had Mr. Overdahl in

custody and under arrest. Concerning Mr. Overdahl's arrest status, the Washington State Supreme Court observed:

> We begin by stating the trial court correctly determined Overdahl had been placed under arrest at the time he was apprehended outside Orton Hall carrying the bottle of gin. Overdahl continued to be under arrest when he was accompanied to his room by Officer Daugherty. As the State observes, there was nothing to prevent Officer Daugherty from accompanying Overdahl to his room.

State v. Chrisman, 94 Wn.2d 711, 716 (Pet.App. B, p. 38); see also the Court of Appeals Opinion (Pet.App. A, pp. 24-26)

The Washington State Supreme Court in this case held that the "plain view doctrine" did not apply since the State did not satisfy the first prong of that doctrine which required a showing that there was "a prior justification for intrusion"; see Coolidge v. New Hampshire, 403 U.S. 433, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). In the majority opinion the Washington State Supreme Court reasoned that the arrest

status of Mr. Overdahl, although accompanied with a request by him to return to his premises to secure identification, did not afford the officer a reasonable basis to accompany him onto the premises. The majority would require that the officer secure a warrant, and/or presumably consent, prior to his entry on the premise.

It is the State's position that it was reasonable for the officer to accompany Mr. Overdahl on the premises even though his entry on the premises was not simultaneous but rather contemporaneous with the entry of Mr. Overdahl. Only approximately 30 to 45 seconds elapsed from Officer Daugherty's arrival at the door of Mr. Overdahl and the defendant's dorm room and the officer's entry onto the premises. Although there are general policy reasons for always allowing an officer to accompany an arrestee who has been permitted to volun-

tarily return to his premises which will be discussed later in this argument, it is noted that there are some particular factors that additionally add to the reasonableness of the officer's conduct in this particular situation.

First of all, when Mr. Overdahl entered the dorm room, both his and the defendant's reasonable expectation of privacy was substantially reduced by Mr. Overdahl's leaving the door to the premises wide open and exposing the approximately 11 by 17 room and its contents and occupants to a fairly full view of the officer. Additionally, the record indicates that although the officer could fairly well keep Mr. Overdahl in sight, he could not entirely determine what he was doing or what items he had access to while Mr. Overdahl was attempting to locate his identification (J.A. 22).

Although the Washington State Supreme

Court in this matter appears to interpret the United States Constitution as prohibiting the entry of Officer Daugherty onto the premises pursuant to accompanying the arrestee, it cites no convincing authority for said proposition. It is the State's position that the United States Constitution does not prohibit a police officer from accompanying an arrestee to his premises, room, dwelling or other location when such a person, legally in custody, asks to be given access to such an area. See State v. Brown, 132 N.J.Super. 180, 333 A.2d 264 (1975). For authority from courts of other jurisdictionsin analogous situations, see United States v. Mason, 523 F.2d 1122, 1126 (D.C.Cir., 1975); United States v. Wright, 577 F.2d 378, 381 (6th Cir., 1978); United States v. DeMarsh, 360 F.Supp. 132, 137, n.4 (E.D.Wis., 1973). It appears clear that once the officer has a defendant in his control

the officer is authorized to accompany the defendant to other areas. See United States v. Distefano, 555 F.2d 1094, 1101 (2nd Cir., 1977); Moffett v. State, 291 A. 382, 281 So 2d 630 (1973), cert denied 414 U.S. 1161, 39 L.Ed.2d 114, 94 S.Ct. 924 (1974); People v. Stevens, 38 Cal.App.3d 66, 113 Cal.Rptr. 49 (1974); People v. Green, 14 Ill.App.3d 972, 304 N.E.2d 32 (1973), cert. denied, 417 U.S. 972, 41 L.Ed.2d 1143, 94 S.Ct. 3179 (1974); People v. Mann, 61 Misc.2d 107, 113, 305 N.Y.S.2d 226 (1969).

Not to allow officers to accompany an arrestee is to conversely and indirectly encourage officers not to allow an arrestee to move freely to other areas for fear the officer may later be "second guessed" by a reviewing court and advised that the Fourth Amendment would require a search warrant to allow the officer to accompany the mobile arrestee. Such a position would appear to

encourage a situation that would discourage allowing arrestees reasonable mobility. In the case at bar the arrestee asked to be able to return to his room. It is submitted that our system of law should encourage officers to allow an arrestee as much reasonable freedom of movement as possible, provided it does not otherwise interfere with the officer's ability to control his arrestee and perform his functions, as well as protecting himself and his fellow officers and society.

In this case Officer Daugherty simply tried to allow the arrested suspect sufficient mobility to produce identification in an attempt to expedite the suspect's release. The officer must have corresponding authority to accompany his arrestee, with the "plain view doctrine" expanding to correspond with the necessities of the situation. See United States v. Griffith,

537 F.2d 900, 905 (7th Cir., 1976); United States v. Mason, 523 F.2d 1122, 1125-1126 (D.C. Cir., 1975) (by implication); see particularly a detailed discussion contained at pages 420-424, Sec. 6.4, Vol. 2 of Search and Seizure, A Treatise on the Fourth Amendment, by Wayne R. LaFave, West Publishing Company (1978).

It is noted that allowing Mr. Overdahl to return to his eleventh floor dorm room to retrieve his ID to more smoothly effectuate his ultimate release was a matter of personal convenience to Mr. Overdahl. It appears there is very little distinction between allowing Mr. Overdahl to return for his ID and the analogous situation of allowing him to return for another item of personal property, such as a coat or other articles of clothing; see State v. Brown, 132 N.J.Super. 180, 333 A.2d 264 (1975).

It does not appear that this Court

has ever in any definitive fashion determined the precise issue presented for review in this case. However, the Washington State Supreme Court's ruling in this matter seems to be at least philosophically in conflict with the courts of other state jurisdictions. The Alabama Supreme Court in Moffett v. State, 291 Ala. 382, 281 So.2d 630, 632 (1973), cert. denied 414 U.S. 1161 (1974), held that an officer was permissibly in the bedroom and the seizure of the pistol in plain view was permissible since the officer had a right to be where he was, tacitly approving the officer's ability to accompany an arrestee to another portion of the premises. Moffett v. State, supra, involved a situation where the defendant was arrested without a warrant at the door of his premises and requested of the officer that he be permitted to go into the bedroom on the premises

where he was allowed to go but was followed and accompanied by the arresting officer. After entering the bedroom, the officer saw a pistol in plain view. Additionally, in People v. Green, 141 Ill.App.3d 972, 304 N.E.2d 32, 40 (1973), cert. denied 417 U.S. 972 (1974), the Illinois court allowed an officer to accompany a defendant onto the premises (his YMCA room) when the defendant asked to be allowed to voluntarily return to the premises.

It is submitted that the Washington State court in its analysis of why it was not necessary for Officer Daugherty to accompany Mr. Overdahl onto the premises sets an artificial standard for determining that necessity. The Washington State Supreme Court stated:

> There is absolutely no evidence that it was necessary for Officer Daugherty to enter the room to seize a weapon which might be used in an assault, that the bottle of gin was about to be destroyed, or that Overdahl was going to attempt

> to escape. It was a small room. Officer Daugherty was standing in the one exit, and it was on the 11th story. It was not necessary for the officer to enter the room to make certain Overdahl secured his identification.

94 Wn.2d 717, Pet.App. B, p. 39.

It is submitted that the point of view expressed by the Washington State Supreme Court is unrealistic if a law enforcement officer is expected to do a competent job. What an arrestee may or may not do in any given situation to jeopardize evidence or the safety of an officer or others is simply too unpredictable. What the Washington State Supreme Court seems to be suggesting is that the officer is not allowed to place reasonable restrictions and supervision on the movement of an arrestee unless he can articulate some specific danger to himself or potential evidence. The problem with this approach is that too often by the time an officer would realize the danger to the

evidence or his person, it would be too late to do anything effective about it. An officer, in order to do an effective job and protect himself, must be permitted some reasonable constitutional latitude to take precautionary measures in the exercise of his function, particularly as such relates to the supervision, control and custody of an arrested individual. Human nature being what it is and the seeming increase in our society of bizarre behavior in response to an arrest even for minor violation; e.g. minor traffic citations; makes it imperative that the courts do what they can to afford officers reasonable latitudes in controlling arrested persons. It is difficult to say with any degree of certainty that the need for police safety is less compelling simply because the person is under arrest for a minor crimianl offense; see Pennsylvania v. Mimms, 434 U.S. 106, 109-110, 54 L.Ed.2d

331, 336-337, 98 S.Ct. 330 (1977). Surely permitting an officer to accompany the arrestee onto premises that the arrestee has voluntarily returned to is no more of an intrusion upon the arrested person's right to be secure from unreasonable searches and seizures than say for example, a custodial search pursuant to a traffic arrest.

By analogy, this court has in the past afforded officers broad authority to search the person of an arrested individual to prevent the destruction of evidence and to protect the officer without requiring the officer to define with specificity or otherwise articulate any particular circumstances in the situation which justified the search. In short this court has allowed an arresting officer to not only search the person but to search the immediate area within the control of the arrestee, not only to

avoid the destruction of evidence but to protect the officer. Chimel v. California, 395 U.S. 752, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969); United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973); and Gustafson v. Florida, 414 U.S. 260, 38 L.Ed.2d 456, 94 S.Ct. 488 (1973). It makes little sense to say just because Mr. Overdahl was arrested outside his premises and was allowed to return to his premises that the officer should not be allowed to accompany him onto the premises to effectuate the officer's continuing protection. The officer obviously had no way of knowing whether Mr. Overdahl would attempt to escape or would have an opportunity to procure a weapon (or an item that could be used as a weapon against the officer) from his premises. It is not the likelihood of Mr. Overdahl doing such a thing that seems constitutionally significant, but rather the

fact that common experience teaches us that such is a probability that a law enforcement officer cannot afford to ignore. Officers must be afforded a reasonable opportunity to protect themselves.

This court in United States v. Robinson, supra, stated:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an excep-

> tion to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment. (emphasis mine)

414 U.S. 235, 38 L.Ed.2d 440-441.

It is submitted that Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), which was cited by the Washington State Supreme Court in its opinion in this matter, is not particularly helpful because it is distinguishable in that it deals with an entry into a private residence for the purposes of effectuating an arrest as opposed to dealing with the question of an officer's authority over an arrestee who is allowed to return to his premises once the arrestee is in custody.

It appears then that Officer Daugherty's entry upon the premises was constitutionally permissible as an adjunct to the arrest status of Mr. Overdahl who had voluntarily returned to the premises in question.

Since the officer had authority to

enter the premises, he had authority to seize the contraband in "plain view"; see Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

Even if this court should conclude that the conduct of Officer Daugherty in entering the premises and seizing the contraband was tantamount to an unreasonable search and seizure, it is submitted that the exclusionary rule should not be applied to the case at bar. The evidence seized is the product of an officer's "good faith" search and/or seizure. This court stated in United States v. Peltier, 422 U.S. 531, 542, 45 L.Ed.2d 374, 384, 95 S.Ct. 2312 (1975):

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol

> searches by the federal judiciary was overturned by this Court's decision in Almeida-Sanchez. But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that the respondent's Fourth Amendment rights were violated by the search of his car. (emphasis mine)

CONCLUSION

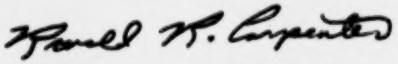
It is submitted that the original seizure of the contraband by Officer Daugherty was permissible pursuant to the "exigency exception" to the warrant requirement of the Fourth Amendment. It was additionally permissible as a "plain view" seizure which followed the officer's permissible entry onto the arrestee's premises to accompany the arrestee. The search and seizure by Officer Daugherty was also a "good faith" search and seizure to which

the exclusionary rule should be not be applied. The subsequent consent to search given by the defendant to the officers was not obtained through exploitation of the defendant's Fourth Amendment rights nor was it otherwise the product of an illegal search and seizure and therefore was valid. Consequently, both the evidence originally seized by Officer Daugherty when he first entered the room and the evidence seized as a product of the search and seizure conducted on the authority of the properly obtained consent to search given by the defendant to the officers were improperly suppressed by the Washington State Supreme Court.

The judgment of the Washington State Supreme Court, insofar as it suppressed the evidence and reversed the conviction of the defendant, NEIL MARTIN CHRISMAN, the respondent herein, should be reversed; the decisions of the trial court and the Washington

State Court of Appeals should be affirmed and reinstated.

Respectfully submitted,



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